NO. 89-219

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GARY LEON BROWN,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A
WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

---

# RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

---

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
P. DAVID BJURBERG*
ASSISTANT ALABAMA ATTORNEYS GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
(205) 261-7300

ATTORNEYS FOR RESPONDENT

*Counsel of Record

## QUESTIONS PRESENTED

I. Whether this Court should grant certiorari where the issue raised was not presented in the courts below.

II. Whether petitioner abandoned his constitutional challenge when he did not brief the constitutional issue to the state supreme court.

## PARTIES

The caption contains the names of all parties in the courts below.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF CASES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF THE ARGUMENT | 9 |
| ARGUMENT | 10 |
| CONCLUSION | 14 |
| CERTIFICATE OF SERVICE | 15 |

TABLE OF CASES


| | PAGE |
|---|---|
| Bailey v. Anderson, 236 U.S. 203 (1945)-------- | 11 |
| Board of Directors of Rotary International v. Rotary Club of Durante, 481 U.S. 537 (1987)-------- | 11 |
| Street v. New York, 395 U.S. 576 (1969)-------- | 11 |
| United States v. Nobles, 422 U.S. 225 (1975)-------- | 13 |
| Wainwright v. Goode, 464 U.S. 78 (1983)--------- | 12 |

## OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and sentence is published as Brown v. State, 545 So.2d 106 (Ala. Cr. App. 1988).

2. The opinion of the Alabama Supreme Court affirming the Alabama Court of Criminal Appeals' affirmance of Petitioner's conviction and sentence is published as Ex parte Brown, 545 So.2d 122 (Ala. 1989).

## JURISDICTION

The Alabama Supreme Court denied Petitioner's rehearing on May 5, 1989. On June 23, 1989, Justice Kennedy extended Petitioner's time for filing his petition for certiorari to and including August 3, 1989. The petition was mailed, under an appropriate affidavit, on August 3, 1989.

Respondent maintains that this Court does not have jurisdiction over the Eighth Amendment claim because it was never presented to the state courts. Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Street v. New York, 394 U.S. 576 (1969). Otherwise, this Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner makes claims allegedly involving the Eighth and Fourteenth Amendments which he has set out in his petition.

## STATEMENT OF THE CASE

Petitioner was indicted for the capital offense of murder during a robbery in violation of §13A-5-20(a)(2), Code of Alabama, 1975. The jury found the appellant "guilty of capital murder as charged in the indictment". After the punishment phase of the trial the jury returned an advisory verdict for death by a vote of ten "for death" and two "for life without parole." The trial judge upheld the jury's advisory verdict by sentencing the appellant to death by electrocution.

Petitioner's sole contention in his petition relates to a witness', Jimmy Davenport, testimony. The Alabama Court of Criminal Appeals set out in some detail Davenport's testimony which is reproduced below:

Jimmy Davenport testified that on May 26, 1986, he went fishing with his brother-in-law, James Bynum, Archie Bankhead and the appellant. While fishing, they were drinking beer and whiskey. All four men then went to Chuck and Willie's Lounge to play pool and drink. The four men left the lounge together with Davenport doing the driving.

Davenport stated that he heard them say "something about going and killing a queer, or something like that." (R. 567) They (Bankhead and appellant) both were asking Bynum:

> "'How hard can you hit?' and you know James was saying, 'Pretty hard.' And I guess -- I think Gary asked him 'Well, can you knock this old man out?' And James said, 'yes', he could. And then Gary said, 'Well, if you can't, I can', or something like that. And that's about it." (R. 570)

Bynum gave Davenport directions to the victim's trailer. Bynum, Bankhead and the appellant went up to the victim's trailer and knocked on the door. The victim opened the door and

let them come inside. A short time later all four came back outside the trailer. Bankhead grabbed the victim around the neck in a "headlock". Bynum and the appellant were hitting the victim. (R. 571) Bankhead, Bynum and the appellant picked the victim up and carried him inside the trailer. Davenport observed this while sitting in his car.

Davenport did not see the victim after the altercation. When Bynum, Bankhead and the appellant came out of the trailer, they were carrying items. Davenport observed blood on all three men. The back seat was so full of items from the victim's trailer that the appellant rode in the trunk to Bankhead's house.

The stolen items were taken into Bankhead's residence. Davenport could not remember vel non if he helped carry the items into the house.

Davenport testified that Bankhead gathered all four of their shirts, the appellant's pants and Bankhead's pants and burned them in the backyard. The reason for burning the

clothing was that it had blood on it. Davenport stated that he had blood on the shoulder of his shirt because Bankhead had brushed Davenport's shit when he got into Davenport's automobile.

A wallet was seen by Davenport in Bankhead's kitchen. Davenport received some of the money which the wallet contained.

On cross-examination Davenport admitted that he had not told the grand jury about seeing the wallet in question, Bankhead's burning Davenport's shirt, or statements made by the three men on the way to the victim's house.

The day before the jury for this trial was struck, Davenport talked with Mr. Anderton and Mr. McGregor, assistant district attorneys. After being asked several times, Davenport admitted overhearing statements made on the way to the victim's trailer. Davenport indicated that Anderton had told him that a case could be made against Davenport, but right now they were not going to charge Davenport with any crime.

> Davenport stated that no conversation took place at Bankhead's house because they did not want Bankhead's wife to overhear them.
>
> After cross-examination the prosecution made a motion to require that the taped interview between the prosecutors and Davenport be played for the jury. The reason for this was that the tape would be played instead of rehabilitative testimony.

Brown, 545 So.2d at 108-109.

Other primary evidence against Petitioner consisted of his three voluntary statements to the police, particularly his July 17, 1986 statement wherein Petitioner admitted stabbing the victim "quite a few times". Id. at 111. (See also Appendix A to the Court of Criminal Appeals' opinion beginning at 545 So.2d 116, 117-110, wherein the trial court gives further details from Petitioner's July 17 statement.) A pathologist testified that he found between fifteen and sixteen stab wounds

to the victim's neck and fifty-nine wounds from the neck downward to the base of the victim's shoulder blades. He also found the victim's carotid artery had been slashed. Brown, 545 So.2d at 108-109. Death was caused when the victim bled to death. Id., at 109.

In the state intermediate appellate court, Petitioner presented his claim concerning Davenport's testimony in terms of the Fifth Amendment asserting that it had been coerced by the prosecutors' questioning of Davenport the day before trial. Id., at 113. In his brief to the Alabama Supreme Court, the claim was presented on neither Fifth Amendment nor Eighth Amendment grounds but on prosecutorial misconduct grounds. See Respondent's Appendix A, portions of Petitioner's Brief to the Alabama Supreme Court.

## SUMMARY OF THE ARGUMENT

Petitioner's Eighth Amendment claim was never presented to the state courts and thus is not properly before this Court.

Furthermore, Petitioner abandoned his constitutional challenge on either Eighth or Fifth Amendment grounds in the state supreme court when he did not brief the question to that court. Assuming, arguendo, this Fifth Amendment claim was before the state supreme court, it correctly affirmed the lower appellate court's ruling that Petitioner has no standing to assert a testifying third party's Fifth Amendment rights.

## ARGUMENT

### I.

### THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ISSUE PRESENTED HERE WAS NOT RAISED IN THE COURTS BELOW.

Petitioner raises an issue, based on the Eighth Amendment, regarding the use in a capital case of what he calls "coerced evidence." This was not, however, the issue he raised below. As Petitioner admits in his petition (p. 8), he argued this issue to the Alabama appellate courts simply in terms of voluntariness, with no mention of the Eighth Amendment or the special circumstance of this being a capital case. The Alabama Court of Criminal Appeals addressed this issue based on the "Fifth Amendment and Miranda rights",

Brown v. State, 545 So.2d at 113-114, and the Alabama Supreme Court merely affirmed this judgment, Ex parte Brown, 545 So.2d at 122. Thus, the Eighth Amendment issue presented here was not raised below.

This Court has no jurisdiction to decide issues not considered in the state court below. Board of Directors of Rotary International v. Rotary Club of Durante, 481 U.S. 537 (1987); Street v. New York, 395 U.S. 576, 581-582 (1969); Bailey v. Anderson, 236 U.S. 203, 206-207 (1945). Because Petitioner failed to present this Eighth Amendment claim to the Alabama appellate courts, this Court should deny certiorari.

II.

PETITIONER ABANDONED HIS CONSTITUTIONAL CLAIM WHEN HE DID NOT BRIET IT TO THE STATE SUPREME COURT.

Not only was Petitioner's Eighth Amendment claim not raised below, he abandoned his constitutional challenge on either the Eighth or Fifth Amendment grounds in his brief to the Alabama Supreme Court. Instead Petitioner presented his claim in terms of prosecutorial misconduct because they failed to disclose the statement under Rule 18.3 of the Alabama Rules of Criminal Procedure. As presented to the state supreme court, the issue boiled down to one involving an interpretation of a state criminal procedural rule. A state court's interpretation of state law is binding on this Court. Wainwright v. Goode, 464 U.S. 78, 84 (1983). It is axiomatic that issues of

state law do not present questions of a constitutional dimension and therefore this Court does not have jurisdiction over them. Thus, Davenport's testimony, as presented to the Alabama Supreme Court, did not present any constitutional challenge and Petitioner's attempt to reincarnate the constitutional challenge should be rejected by this Court.

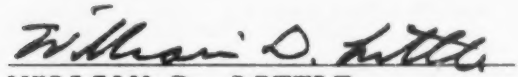
Finally, assuming, arguendo, that the constitutional challenge was somehow presented to the Alabama Supreme Court, it was presented on Fifth Amendment grounds only. The Alabama Court of Criminal Appeals correctly held that Petitioner had no standing to assert Davenport's Fifth Amendment rights. Brown, 545 So.2d at 113-114. See United States v. Nobles, 422 U.S. 225, 234 (1975). Since the Court of Criminal Appeals correctly decided this issue, this Court should deny certiorari.

## CONCLUSION

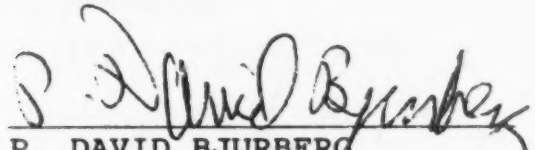
The Court should deny the petition for writ of certiorari to the Alabama Supreme Court.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



WILLIAM D. LITTLE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA



P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Alabama State House
11 South Union Street
Montgomery, Alabama 36130
205-261-7300

RESPONDENT'S APPENDIX A

IN THE SUPREME COURT OF ALABAMA

| | | |
|---|---|---|
| GARY LEON BROWN, | ) | |
| | ) | |
| APPELLANT | ) | SC NO._____ |
| | ) | |
| vs. | ) | COURT OF CRIMINAL |
| | ) | APPEALS CASE |
| STATE OF ALABAMA, | ) | NO. 6 DIVISION 316 |
| | ) | |
| APPELLEE, | | |

---

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

---

BRIEF OF APPELLANT, GARY LEON BROWN

---

Below is the statement of the issues are presented to the Alabama Supreme Court in Petitioner brief and all of his third argument concerning Davenport's testimony.

I. Whether the trial court erred in denying Appellant's Motion to Suppress statements made by him.

II. Whether the trial court erred in denying Appellant's Motion for Mistrial based upon admission of his statement which contained evidence of other crimes.

III. Whether the trial court erred in refusing to grant a mistrial on the grounds of prosecutorial misconduct.

IV. Whether the court erred in allowing the prosecution to impeach its own witness.

* * * * * * * * * * *

## III.

## THE COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR MISTRIAL ON GROUNDS OF PROSECUTORIAL MISCONDUCT.

The evidence established that the taped interview with the witness Davenport in which he changed his story to implicate Defendant on the issue of

intent was not disclosed until the morning of the trial. The opinion of this court states that Young v. State, 494 So.2d 682 (Al Crim App 1986) should not control because in Young the defense counsel did not learn of the additional statement until the police officer actually testified at trial even though the prosecutor knew about the statement prior to that time. The court in Young noted that temporary Rule 18.3 requires continuing disclosure. The court cited United States v. McElroy, 597 F.2d 459 (2nd Cir 1982) for the proposition that where the government has failed to continue to disclose and the failure substantially prejudiced the defense a reversal is warrant. In Young the court reversed on a single sentence. In the present case this was an entire statement which took over an hour to

replay to the jury. The damaging effect was far greater than that in Young. In Young the sentence was one of life imprisonment. In the present case Defendant's death sentence was based in large part on this improperly admitted statement of Davenport's. The trial court might have granted a continuance to Defendant. Instead it merely allowed Defendant to listen to the damaging tapes prior to cross examination. This did not allow sufficient preparation time to attempt to counter the damaging effect of this piece of evidence. Defendant's motion for mistrial made at R. 620 based upon prosecutorial misconduct was based upon the actions of the State in waiting until the morning of trial to disclose the content of the changed statement. This motion was due to be granted and in denying it the court erred to reversal.

## CERTIFICATE OF SERVICE

We, William D. Little and P. David Bjurberg, the members of the Bar of the Supreme Court of the United States, do hereby certify that this 5th day of September, 1989, we did serve the required number of copies of this brief and a copy of the accompanying appendix on attorney for the Petitioner by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Thomas Martelle Goggans
1018 Union Bank Tower
Montgomery, Alabama 36104

We further certify we have served all parties required to be served.

WILLIAM D. LITTLE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

1945I